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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 662

AERO CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1–A11) is reported at 363 F. 2d 702. The Board's decision and order (R. 227–403)[1] are reported at 149 NLRB 1283.

JURISDICTION

The judgment of the court of appeals was entered on June 15, 1966 (Pet. App. A12–A13). On September 12, 1966, Mr. Chief Justice Warren extended the time for filing a petition for a writ of certiorari to and

[1] "R." refers to the portions of the record printed as a joint appendix in the court below.

including October 13, 1966. The petition was filed on October 12, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth in Appendix B to the petition, pp. A13–A16.

QUESTIONS PRESENTED

1. Whether the Board properly found that a majority of the employees validly authorized the union to represent them for collective bargaining.

2. Whether the Board's finding that petitioner unlawfully refused to bargain with the union was based on events which occurred more than six months prior to the filing and service of the unfair labor practice charges, contrary to Section 10(b) of the Act.

3. Whether the Board's unfair labor practice findings are based on "views, argument, or opinion" protected by Section 8(c) of the Act.

4. Whether petitioner was entitled to inspect affidavits of employees who were not called as witnesses by the General Counsel.

STATEMENT

A. THE BOARD'S FINDINGS OF FACT

1. Early in 1962, the Union [2] began an organizing campaign at petitioner's plant at Lake City, Florida.

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[2] International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL–CIO.

On February 27,[3] the Union held its first organizational meeting, attended by 30 to 50 employees. At the meeting, Union Organizer Fred Quatrini outlined an organizational campaign and passed out authorization cards (R. 234–235).[4] Quatrini told the employees that, if a majority of the employees signed cards, the Union would ask the Company to recognize it and start negotiations, but, if the Company would not recognize the Union, it would then have to go through an NLRB election (R. 399; 143). Twenty-one employees signed cards at this initial meeting (R. 235).

At another meeting, on March 27, an employees' organizing committee was selected, and on April 5 an

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[3] Unless otherwise specified, all dates are in 1962.

[4] The cards contained printing in various sizes of type, as shown on pages 211–213 of the record, and read as follows:

AUTHORIZATION TO UAW

FILL IN BLANKS Date_____

I, the undersigned employee of

_____

(Name of Company)

authorize UAW to represent me in collective bargaining.

Signature of Employee_____

Name of Employee—Please Print_____

Home Address_____

City_____ State_____

Class of Work_____ Shift_____

Telephone No._____ Badge or Clock No._____

This is not an application for membership. This card is for use in support of the demand of (UAW), American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) for recognition or for an NLRB election.

additional meeting was held. At these meetings, Quatrini repeated the explanation given at the first meeting concerning the authorization cards (R. 235, 399; 143). More cards were signed at these meetings and during the interval between them, so that by April 9, 50 of the 98 employees then in the unit had signed cards (R. 377; 384–388).

On that date, the Union wrote petitioner that a majority of its production and maintenance employees had designated the Union as their exclusive bargaining agent and that it wished to begin bargaining immediately (R. 229; 209). On April 16, petitioner replied to the Union's demand for recognition as follows (R. 230; 210):

> Your recent letter requesting recognition as exclusive bargaining representative for our employees has been received. It is our opinion that our employees do not desire your union to represent them.
>
> In any event, we must insist that our employees be given an opportunity to vote on this important matter in an NLRB election before we assume that you have captured them.

Meanwhile, on April 10, the Union had filed a petition for a Board election. On April 26, a hearing on the representation petition was held, and on May 10, the Regional Director scheduled an election for June 1 (R. 230). Throughout this period the Union continued to hold meetings and solicit authorization cards (R. 235).[5]

[5] During this period the size of the unit increased to 120 and the number of union adherents increased to 65 (R. 384–388).

2. Petitioner was aware of the organizational campaign from its inception (R. 236–237) and almost immediately undertook to defeat the organizational effort. On the day after the initial meeting, Foreman Haywood Martin interrogated two employees about what they thought of the meeting, who was there, and what was said (R. 261). Martin also interrogated other employees about their union views, and warned employees that, if the Union prevailed, petitioner would move the plant (R. 261–265; 77). Other officials expressed similar opinions (R. 263, 265). Employee Russell Horne was made a foreman's assistant with the understanding that he would do what he could to keep the Union out (R. 268; 42–43). Another employee was told a raise awaited him when he returned from sick leave, provided the Union did not get voted in (R. 267; 22). At least three union meetings were spied upon by petitioner's superintendent, Carl Price, who drove his car slowly in front of the meeting hall and parked for long periods of time, in order to observe employees who were going into the meetings (R. 257–258).

Finally, prior to the election, two employees were discharged. One was a member of the employees' organizing committee and the other was the instigator of the union drive (R. 271–278, 288–299).[6]

[6] A third employee, another member of the organizing committee, was discharged on August 13, three days after the second election (see *infra*, p. 6) (R. 319–322; 216–217). A fourth union activist was discharged on October 17, shortly after the Regional Director set aside the second election (R. 339–346).

3. The Union lost the June 1 election by a vote of 49 to 43, with 4 challenged ballots. Upon objections by the Union, the Board's Regional Director, finding that the Company's conduct had interfered with the employees' free choice, set the election aside and ordered a new election for August 10 (R. 231).

Before the second election, petitioner continued to interrogate and threaten its employees. It told one employee that "the best way for him to get laid off was * * * to keep campaigning for the Union" (R. 266–267; 87). Three other employees were promised raises in a context of anti-union interrogation (R. 268–269, 24–25; R. 262, 141; 269, 98–99). The Union lost the second election by a vote of 59 to 55, and the Regional Director again set aside the results on the ground that the Company's conduct had interfered with the employees' free choice (R. 231).

On October 25, the Union filed a charge alleging that the Company had refused to bargain in violation of Section 8(a)(5) of the Act (R. 231), and a complaint issued on this and the other charge[7] which had been filed against petitioner.

B. THE DECISIONS BELOW

The Board found that petitioner violated Section 8(a)(1) of the Act by spying on union meetings, and by interrogating, threatening, and making promises of benefit to employees. It further found that petitioner discharged four employees because of their

[7] A charge asserting violations of Section 8(a)(1) and (3) of the Act had been filed by a discharged union adherent on July 31 (R. 227, n. 1).

union activities, in violation of Section 8(a) (3) and (1) of the Act (R. 391–392).

In addition, the Board found that petitioner had refused to bargain in violation of Section 8(a)(5) of the Act. It held that the Union had valid authorization cards from a majority of the employees in the bargaining unit and that petitioner did not have a good faith doubt as to the Union's majority (R. 392–403). Respecting the lattter issue, the Board stated (R. 393):

> [Petitioner's] overall conduct effectively rebuts its claim of a good faith doubt of the Union's majority status, and convincingly demonstrates that it refused to recognize the Union in order to gain time in which to destroy the Union's majority by engaging in unfair labor practices during the election campaign. Thus, * * * [petitioner's] illegal interference with the right of its employees to organize commenced the day after it learned that they were organizing, and was so aggravated as to make impossible the free expression of choice of a bargaining representative by the employees in the two elections conducted by the Board. * * *

The Board ordered petitioner to cease and desist from the unfair labor practices found, to reinstate the unlawfully discharged employees, and to bargain with the Union upon request (R. 381–383).

The court of appeals sustained the Board's findings and enforced its order in full (Pet. App. A1–A11).

ARGUMENT

1. Petitioner challenges the Board's finding that the Union had valid authorization cards signed by a majority of petitioner's employees, contending that the cards were ambiguous, that the employees who signed the cards intended merely that they be used to secure an election to determine the Union's representative status, and that the Union misrepresented the purpose for which they were to be used (Pet. 25–37). These questions turn essentially on the particular facts of this case and do not warrant review by this Court.

The card specifically stated, in prominent type, that the signer "authorize[s] [the Union] to represent [him] in collective bargaining." Although the fine print at the bottom explains that the card may be used in support of a demand for recognition "or for an NLRB election"[6] (*supra*, p. 3, n. 4), it has generally been held that the mere indication of the latter alternative is not sufficient to cloud the purpose of the card and render it invalid as a union authorization card.[7] And, where, as here, the card clearly authorizes

[6] The Board, in order to avoid conducting elections in which the petitioning union has no substantial likelihood of success, has long held that a union seeking a representation election must demonstrate that at least 30 percent of the employees involved are interested in selecting it as a representative. See National Labor Relations Board, Rules and Regulations and Statements of Procedure, Sections 101.17–101.18, 29 C.F.R. 101.17–101.18; see also *National Labor Relations Board* v. *J. I. Case Co.*, 201 F. 2d 597, 598–600 (C.A. 9).

[7] See, *e.g.*, *National Labor Relations Board* v. *Winn-Dixie Stores, Inc.*, 341 F. 2d 750, 754 (C.A. 6), certiorari denied, 382 U.S. 830; *National Labor Relations Board* v. *S.N.C. Mfg. Co.*,

union representation, it is also well settled that the card may not be impeached by testimony of employees, given long after it was obtained, that they had a different intention.[10]

In *National Labor Relations Board* v. *Peterson Bros.*, 342 F. 2d 221, 224–225 (C.A. 5), the court held that a card similar to the one used here was ambiguous on its face and, upon analysis of the evidence, ruled that at least four employees had misunderstood its purpose. While that court's ruling as to the ambiguity of the card differs from the decision here and in the other cases where the point was considered (see n. 9, *supra*), a disagreement over the interpretation of a particular authorization card does not present an issue warranting review by this Court. In any event, the situation in *Peterson* differs in significant respects from that involved here. The record in *Peterson* showed that union representatives had misrepresented the purpose of the authorization card to at least one employee—which suggested that other employees may have been similarly misled. Here, on the other hand,

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352 F. 2d 361 (C.A.D.C.), certiorari denied, 382 U.S. 902; *National Labor Relations Board* v. *Gotham Shoe Mfg. Co.*, 359 F. 2d 684, 686 (C.A. 2); *National Labor Relations Board* v. *C. J. Glasgow Co.*, 356 F. 2d 476, 478 (C.A. 7).

[10] *National Labor Relations Board* v. *Winn-Dixie Stores, Inc.*, *supra*, at 755; *Colson Corp.* v. *National Labor Relations Board*, 347 F. 2d 128, 135 (C.A. 8), certiorari denied, 382 U.S. 904; *National Labor Relations Board* v. *Hyde*, 339 F. 2d 568, 570 (C.A. 9); *Joy Silk Mills* v. *National Labor Relations Board*, 185 F. 2d 732, 743 (C.A.D.C.), certiorari denied, 341 U.S. 914; *National Labor Relations Board* v. *Greenfield Components Corp.*, 317 F. 2d 85, 89 (C.A. 1); *National Labor Relations Board* v. *Stow Mfg. Co.*, 217 F. 2d 900, 902 (C.A. 2), certiorari denied, 348 U.S. 964.

no employee testified that he was told that the sole purpose of the card was to secure an election. The Board expressly found that no such misrepresentations were made (R. 400), and the court below correctly accepted that finding. Moreover, in *Peterson*, the trial examiner had found that three employees had misunderstood the purpose of the card. Although the Board had rejected these findings, the court of appeals accepted them on the basis of the employees' testimony, which indicated that they did not intend to authorize the union to represent them.[11] This is not the case here. The employee testimony cited by petitioner (Pet. 30–32) is fully consistent with Union Agent Quatrini's testimony that he explained the dual purpose of the cards (*supra*, p. 3).[12]

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[11] Indeed one employee, whose card was accepted as valid by the Board, testified that he was illiterate; that his wife had signed and returned the authorization card by mail in his absence; and that, when he heard what his wife had done, "he became angry" (342 F. 2d at 224).

[12] Petitioner also challenges (Pet. 37–42) the Board's finding that the authorization cards were not tainted by the fact that four signatures were solicited by a minor supervisor and that another supervisor transmitted some cards from a Union agent (R. 370–371, 394). This finding does not warrant further review in the light of the holding of the court below that there is "substantial evidence to support the Board's finding that the limited participation and unclear status of the persons involved negatived the possibility that they may have coerced employees into signing up against their wishes" (Pet. App. A10). Moreover, as the Board added, "to permit [the Company] now to rely on [the supervisors'] activities to justify its refusal to recognize the Union designated by a majority of its employees, would encourage [the Company and other employers] to have just such marginal supervisors join in employees' organizing activity, secure in the knowledge that if the Union should gain

2. The Union's charge alleging a refusal to bargain was filed on October 25 and served on October 26. Relying on Section 10(b) of the Act,[13] petitioner contends (Pet. 12–21) that the Board's Section 8(a)(5) finding is barred because the Union's demand for recognition and the Company's refusal occurred on April 9 and April 16, respectively, at least ten days beyond the limitations period. The Board (R. 392–393, n. 3) and the court below (Pet. App. A6–A8) properly rejected this contention.

As shown in the Statement, throughout the 10(b) period the Union continued to claim a majority and to seek recognition, while petitioner attempted to destroy the Union's majority by committing the unfair labor practices found. In these circumstances, as the court below concluded (Pet. App. A7), the "Board was justified in construing the Union's demand and the Company's refusal as a continuing demand for recognition and bargaining, and a continuing refusal, when another 'formal demand in light of the Company's prior peremptory refusal would have been useless,'" quoting from *Local 152, Teamsters* v. *National Labor Relations Board*, 343 F. 2d 307, 310 (C.A.D.C.). See also *National Labor Relations Board* v. *Albritton Engineering Corp.*, 340 F. 2d 281, 285 (C.A. 5), certiorari denied, 382 U.S. 815; *National Labor Relations Board* v. *Teamsters, Local 41*, 225 F. 2d 343, 345–346 (C.A. 8).

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a majority, disclosure of the supervisors' real status would defeat that majority" (R. 395).

[13] That section provides that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board" and its service upon the respondent.

Local Lodge No. 1424 v. *National Labor Relations Board* (*Bryan Mfg. Co.*), 362 U.S. 411, is not to the contrary. There, the only activity within the 10(b) period was the enforcement of a union security agreement, valid on its face; since this activity, by itself, was innocent and could be impeached only by resorting to an event outside the limitations period (*i.e.*, showing that the union lacked majority status when it entered into the agreement), the Court held that the complaint was barred by 10(b). Here, on the other hand, the Company engaged in unfair labor practices within the 10(b) period, which the Board could properly view "as reiterations by deed of the underlying refusal to bargain and hence as establishing a violation of Section 8(a)(5)" (Pet. App. A8).

In any event, as the Board and the court below noted (Pet. App. A8, n. 7), "even if the 10(b) period of limitations were fatal to an 8(a)(5) finding, an affirmative bargaining order would be appropriate to remedy the 8(a)(1) violations found herein, and to restore the *status quo ante*." See *D. H. Holmes Co.* v. *National Labor Relations Board*, 179 F. 2d 876, 879–880 (C.A. 5); *National Labor Relations Board* v. *Caldarera*, 209 F. 2d 265, 267–269 (C.A. 8); *Editorial "El Imparcial," Inc.* v. *National Labor Relations Board*, 278 F. 2d 184, 187 (C.A. 1); *Piasecki Aircraft Corp.* v. *National Labor Relations Board*, 280 F. 2d 575, 591–592 (C.A. 3), certiorari denied, 364 U.S. 933. Contrary to petitioner (Pet. 23), *National Labor Relations Board* v. *Flomatic Corp.*, 347 F. 2d 74 (C.A. 2), does not hold otherwise. Indeed, the court there recognized that a bargaining order might be an appropriate

remedy for an 8(a)(1) violation; it held that such an order was not justified on the particular facts, since the 8(a)(1) violation there was not "flagrant" (347 F. 2d at 78–80).[14]

3. There is no merit in petitioner's contention that the Board's unfair labor practice findings were based on statements of views and opinions protected by Section 8(c) of the Act (Pet. 8–12). There was ample evidence of improper conduct wholly apart from any protected statements. See Statement, *supra*, pp. 5–6. As the court below properly noted (Pet. App. A9): "There is a vast difference between the use of protected statements as evidence of an unfair labor practice, and the use of such statements to draw the background of the controversy and place other non-verbal acts in proper perspective. The latter is all the Board did here."

4. Finally, contrary to petitioner's contention (Pet. 43–45), it was not entitled to obtain copies of affidavits given to the General Counsel by five employees who did not testify at the hearing. Under the rule of *Jencks* v. *United States*, 353 U.S. 657, 667–669, which the Board follows in its proceedings (see *Ra-Rich Manufacturing Corp.*, 121 NLRB 700), the government must make available pre-trial statements of witnesses who testify in its behalf. The purpose of the

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[14] *Flomatic* involved one violation of Section 8(a)(1); a letter distributed by Flomatic's president the day of the election was found to contain promises of benefits contingent on defeat of the union. 347 F. 2d at 76–77. In contrast, the Section 8(a)(1) violations in this case involved, *inter alia*, threats of economic reprisals, coercive interrogation, surveillance and promises of rewards. See *Irving Air Chute Co.* v. *National Labor Relations Board*, 350 F. 2d 176, 182 (C.A. 2).

rule is to permit impeachment of the witness.[15] However, where persons giving pre-trial statements are not called as witnesses, there is no necessity for impeaching them and therefore their statements need not be produced.[16]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1966.

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[15] *National Labor Relations Board* v. *Arkansas-Louisiana Gas Co.*, 333 F. 2d 790, 797 (C.A. 8); *National Labor Relations Board* v. *Central Oklahoma Milk Producers Assn.*, 285 F. 2d 495, 498 (C.A. 10).

[16] The General Counsel did proffer the signatures on the affidavits of the five employees who did not testify in order to permit comparison with the signatures on the authorization cards, but the Company insisted on inspecting the contents of the affidavits as well. This it may not do. *Raser Tanning Co.* v. *National Labor Relations Board*, 276 F. 2d 80 (C.A. 6); *National Labor Relations Board* v. *Vapor Blast Mfg. Co.*, 287 F. 2d 402, 405-407 (C.A. 7); see *Texas Industries, Inc.* v. *National Labor Relations Board*, 336 F. 2d 128, 134 (C.A. 5). In any event, the Board found (R. 397) that the Union had a majority even without counting the cards of these five employees.

U.S. GOVERNMENT PRINTING OFFICE: 1966

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